



IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

No.**79-619**

JAMES KENNEDY,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT**

SCHULMAN & LAIFER
Attorneys for Petitioner
166 Montague Street
Brooklyn, N.Y. 11201

BENJAMIN A. DEMOS, *Of*
Counsel for Petitioner
James Kennedy

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DICK BAILEY SERVICE, INC., P.O. Box X, S.I., N.Y. 10302
Telephone: (212) 447-5358

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The petitioner respectfully requests that a Writ of Certiorari issue to review the judgment Order, entered on September 14, 1979, by the United States Court of Appeals for the Second Circuit in this proceeding.

JURISDICTION

The judgment of conviction was entered against the petitioner Kennedy on May 4, 1979. The judgment was affirmed on appeal to the United States Court of Appeals for the Second Circuit by order entered September 14, 1979.

The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Was the introduction of testimony of the petitioner Kennedy's prior similar acts such error as to require defense counsel's request for a mistrial?

STATEMENT OF THE CASE AGAINST THE APPELLANT

The Government's case was presented through the testimony of: BARRY KANTOR, ERIC DEGAN, DANIEL RODRIGUEZ, CHRISTINE HOPF, DONALD RUNDQUIST, CAROL LYSEK (Taglieri), ANDREW KAFAFIAN AND WILLIAM TAGLIERI, all of whom were co-conspirators of the defendants on trial and were either awaiting sentence or a sentence reduction pursuant to a Rule 35 motion or had very close emotional ties to those awaiting sentence or the outcome of the 35 motions. (59, 163-168, 230, 311-313, 407-408, 475, 510-512, 619-621, 693, 839-840).*

Testimony was also given by Agent Joseph Giaimo, Inspector Thomas Mattina and Robert A. Henderson, DEA chemist, who testified that the substance removed from shaving cream cans seized from Taglieri, Magee, Kantor, Hopf and Rundquist contained cocaine, ranging in purity of 59% to 72%. (584-604)

At trial the Government's case established that Barry Kantor, the alleged head of the conspiracy (366) had discussions with appellant James Kennedy and co-conspirator William Taglieri about smuggling cocaine into the United States since the summer of 1976 until he went to jail (76).

Kantor met Kennedy socially and from 1973-1976 Kennedy supplied him with most of the cocaine he sold. (66) Likewise, Taglieri also supplied Kantor with coke. (125, 846-848)

Apparently, Taglieri had devised a method of smuggling the drugs into the U.S. in shaving cream cans, but both he and Kantor lacked money and the right quality coke. (76, 842A-844)

*Numbers in parenthesis refer to transcript.

In late January of 1976 or 77, co-conspirator Eric Degan was present at co-defendant Joseph Bacher's house where he met Kennedy while a deal was going on. Degan, who had been smuggling coke into the U.S. since 1974 discussed the sale of his South American connection with Bacher and Kennedy for the sum of \$25,000.00 (231-234).

Sometime thereafter, Degan went with Kennedy to Kantor's apartment and sold them 1 oz. of coke. At the time they discussed the sale of Degan's South American connection, but decided it was not practical since there was no money. (77, 234) Degan went back to Utah where he was living at the time. (235)

Before Degan left for Utah, he introduced co-conspirator Daniel Rodriguez to Bacher, who sold Bacher an ounce of cocaine. (235, 316) Degan knew Rodriguez since 1974. They both smuggled cocaine into the U.S. and knew the same connection. (232) Rodriguez would take over what Degan was supposed to do. (235, 316)

Thereafter, Bacher, who knew Kantor for about 1½ years, introduced him to Rodriguez (79-80324)¹ At the first meeting at Rodriguez's house, Kantor, Rodriguez and Taglieri worked out the details for bringing back one (1) kilo of cocaine. (80-82). There was a second meeting at Rodriguez's apartment in March between Kantor, Kennedy, Taglieri and Mr. and Mrs. Rodriguez. (80)²

Kantor testified that the money was to come from Kennedy and co-conspirator Donald Rundquist, whom Kantor had

¹Testimony was elicited that Rodriguez testified in the Grand Jury that Degan introduced him to Kantor and that he told an agent that Degan received \$2,000 for the introduction from Kantor. (360-62, 365)

²In contrast to Kantor's testimony, Rodriguez and Taglieri testified that both Bacher and Winter were at the second meeting. (324, 849)

known since 1970. (81, 512-515)¹ Kantor later testified that he got \$9,500 for the first trip, \$3,500 from Winters and \$6,000 from Winters friend, which he picked up. (84)²

Rundquist flew into New York on Friday and met Taglieri at Kantor's apartment. Everything was explained to him. (517) Kantor got plane tickets through his girlfriend and co-conspirator Christine Hopf, who worked at a travel agency. (83, 412-13)

Thereafter, Kantor, Rundquist, Taglieri, and Rodriguez with his wife, flew to South America and eventually met in Santa Cruz, Bolivia. Rodriguez purchased one (1) kilo of cocaine which was placed into four (4) shaving cream cans and brought back by Taglieri and Rundquist. (84-86, 326, 518-19, 521, 522, 857)

Kantor, who returned to the U.S. on a Saturday, went to the airport on April 19 with Kennedy and co-conspirator Carol Lysek (Taglieri) to meet Rundquist and Taglieri who were returning that day. (87-89, 525-6)

Lysek testified that on the way to the airport Kennedy and Kantor discussed the quality of the cocaine, and Rundquist testified that Kennedy just asked him if there was any problem, told no and then he left. (526, 626)³

Thereafter, they returned to Kantor's apartment to celebrate. Four days later Kantor received the rest of the cocaine totalling 960 grams. (89, 527)

Cocaine was distributed to all the parties and cash payments were made to Taglieri of \$8,000, Rundquist of \$8,000,

¹In contrast to Kantor's testimony, Taglieri testified that Kennedy and Winters were the money men. (850) Also, Kantor later testified that he knew Rundquist had financial problems and that is why he called him. (138)

²Kantor's later testimony indicated that the entire \$9,500 came from Winters. (153-154)

³Rundquist testified Hopf was present at the airport, while Kantor testified she was at the apartment. (525-6)

Rodriguez of \$7,000, Kantor of \$8-9,000, Kennedy of \$8,000 and Winter of \$8-9,000 and Bacher. (90-91, 329, 527, 858)⁴

Hopf testified that Kantor gave her an envelope and told her it contained money for Winters. That she flew to Florida, was met at the airport by Mr. and Mrs. Kennedy and another person. Notwithstanding Kantor's directions, she gave the envelope to the other person when Kennedy told her to do it. (414)

Subsequent to the first trip, discussions were had between Kantor, Taglieri, Kennedy, Rundquist, Degan, Rodriguez, Bacher and Winters regarding a second trip to South America scheduled for the last week in May, for 5 kilos. The testimony was inconsistent as to whether Winters was present at the meeting at Kantor's apartment wherein Bacher's \$25,000 payment was agreed to and the details of the trip explained. (94-99, 236, 330, 531)

In contrast to the above testimony, Kennedy was to supply the money enough to finance 2,000 grams and it was not until just before they left in June, at a meeting in Kantor's apartment, that it was agreed that Winters would supply more money to be able to finance five (5) kilos of cocaine. (237, 861)

The airplane tickets and passport arrangements were made through Hopf and \$11,000 of the total \$23,000 bill was paid by Kennedy who took the money out of a brief case at the agency. (100, 102, 427, 444)

Taglieri testified that on the flight to Rio, he had a discussion with Kennedy whether there was enough money, Kennedy reassuring him that there was someone there with the money. (867) In contrast to this, Kantor, Degan and Hopf testified the discussion took place in Rio and the pooling of funds indicated

⁴Taglieri testified that Winter got \$20,000 but was not sure what Kennedy or Bacher got (858).

there was sufficient money. (105-07, 238, 449)⁷

After meeting in Rio, Rodriguez left for Bolivia and was followed by the Kennedys, the Winters, Kantor, Hopf, Rundquist, Taglieri, Lysek, Degan and Degan's girlfriend and co-conspirator, Patty Mc Gee. (108; 333, 538)

Once in Bolivia, Rodriguez brought cocaine back to the hotel for the group to sample which was not acceptable. (109, 334)

The next day, Rodriguez brought another sample which was acceptable. He received two (2) envelopes, one from Kennedy and the other from Winters containing \$13,000 and \$12,500 cash. Rodriguez purchased two (2) kilos of cocaine and brought it back to the hotel to Kennedy and Kantor. (109, 335, 336, 451-52)

Thereafter, Kantor, Taglieri, Kennedy and Winter packed it into six (6) cans. They were taken by Kennedy and Winters, who checked out the following day and returned to the U.S. (109-110, 542)

The next day, Rodriguez met Taglieri, Degan and Rundquist downtown and gave them three (3) kilos of cocaine. They returned to the hotel and placed the cocaine into eleven (11) shaving cream cans. (111, 242, 338)

Two (2) cans were given to Degan, two (2) to Taglieri and seven (7) cans to Kantor and Rundquist. Kantor and Rundquist made a stop over in La Paz and gave co-conspirators Cooke and Viola four (4) of the cans. (111, 114, 543-44)

Upon returning to the United States, Kantor, Hopf, Rundquist, Degan, Taglieri and Lysek were arrested before leaving the customs area of the airport. (115-118, 244-46, 545) Rodriguez was arrested the day after he returned to the U.S. (339-40)

Although Agent Giaimo testified that it was known that Kennedy and Winters made the trip as early as June 15, 16 or 17, there was no indictment until January of 1978. (808-810)

⁷It must be noted Rundquist testified that at the travel agency he helped count out \$50,000 in cash brought in by Kennedy and Winters. (534)

Following their arrest, Kantor testified he was given 7 ozs. of cocaine from Winters and Kennedy from the cans they brought back. (118)

Following several days of deliberation, the jury found Winters and Kennedy guilty, acquitted Morofsky and were hung as to Bacher. (1267-1268)

REASONS FOR GRANTING WRIT

The District Court's ruling as affirmed by the Second Circuit Court of Appeals regarding the introduction of appellant's uncharged prior similar acts is in conflict with that circuits cases establishing the basis for the introduction of said evidence.

In *United States v. Brettholz*, 485, F.2d 483, 487 (2d Cir. 1973) the Second Circuit Court of Appeals held,

"... that evidence of prior similar acts is admissible for all purposes except to show the criminal character or disposition of the defendant"

Noting the inherently prejudicial character of said evidence the Court went on to state that

"... In ruling on the admissibility of such evidence, the trial judge is required to balance all of the relevant factors to determine whether the probative value of the evidence outweighs its prejudicial character."

and thereafter enumerated various factors to be taken into consideration by the trial judge. *U.S. v. Brettholz, supra*, page 487.

It was the petitioner's contention at trial and thereafter in the Court of Appeals that the probative value of Barry Kantor's testimony, to wit:

"During most of the time from 1973 to 1975 he (Kennedy) supplied me with most of the cocaine I sold." (A6)

did not outweigh its prejudicial effect upon the jury, when considered in light of the facts of the case and thus denied him a fair trial.

In support of his contention, petitioner relied on the Second Circuit's decision in *U.S. v. Brettholz, supra*. Although the case reaffirmed the permissible use of prior uncharged crimes at trial, were placed on notice that by reason of the highly prejudicial nature of said evidence, its use was to be determined by

"... (1) the actual need for the other crimes evidence in light of the issues and the other evidence available to the prosecution, (2) the convincingness of the evidence that the other crimes were committed and that the accused was the actor, ... (3) the strength or weakness of the other crimes evidence in supporting the issue, and (4) the degree to which the jury will probably be roused by the evidence to overmastering hostility." (underlining supplied) *U.S. v. Brettholz, supra*, page 487; citing *McCormick, Evidence* 190 page 447, 453 and *U.S. v. Byrd*, 352 F. 2d 570, 574, (2d Cir. 1965)

In the case at bar, the basis for the introduction of the testimony was on the limited issue of "whether or not the defendant Kennedy acted wilfully, knowingly and intentionally" and the jury was so instructed. (A13-A15, A39-A40)

As noted in *Brettholz, supra* 488

"... Intent ... is placed in issue in the case at trial, either by the nature of the facts sought to be proved by the prosecution or the nature of the facts sought to be established by the defense." *United States v. DeCicco*, 435 F 2d 478, 483 (2nd Cir. 1970)."

Although petitioner readily conceded in the Court of Appeals that intent was placed in issue by the nature of the proof required to be established by the prosecution, petitioner argued that when viewed in light of the other evidence available to the prosecution and which was introduced at trial, the testimony concerning the petitioner's prior similar act was merely cumulative, unnecessary to establish intent and severely prejudiced his right to a fair trial.

As a reading of the trial record indicates, various witnesses testified to Kennedy's alleged participation in the conspiracy, including conversations and discussions regarding the acquisition of cocaine and the financing of the criminal venture charged in the indictment.

Clearly, by reason of the above, although intent was an element to be established at trial, it could not seriously be considered an issue legitimatizing the introduction of the testimony challenged herein.

The real issue at trial was the credibility of the Government's witnesses, which as the facts indicate and the Court charged, must be given careful scrutiny. Petitioner respectfully contends that Kantors revelation to the jury that Kennedy, for approximately four (4) years was the major source of the cocaine he sold was elicited solely to show the criminal character or disposition of the defendant.

It must be noted that petitioner's conviction herein was from a retrial (the first trial ended in a hung jury), where said testimony was not elicited and that defense counsel was not given any notice by the Government indicating their intention of introducing said testimony, and thus be given an opportunity to place argument before the Court without the pressure and coercive alternative faced by the Court of declaring a mistrial.

To hold that petitioner could have conceded knowledge and intent, as argued by the Government, thereby removing the issue and the basis for the introduction of the prior similar act, completely ignores the reasoning of *Brettholz, supra*, that a foundation must be laid other than mere relevance, to wit: actual need to outweigh its highly prejudicial character.⁹

⁹In *U.S. v. Mohel*, DKT No. 79-1017, slip op. 3991, 3996 (2d Cir. July 31, 1979) the defendant attempted to concede knowledge and intent, thereby removing these issues from the juries' consideration. In this case no advance notice was given of its intended use.

Furthermore, with respect to the convincingness of the evidence that Kennedy was Kantor's major source of cocaine for four (4) years, the testimony, given by Kantor is highly questionable. This is not a case where an agent is called to testify as to a prior conviction in open Court, but rather a situation involving a desperate man, trying to and, from admitted past performance, willing to go to extremes in order to serve his own benefit.

With respect to the strength or weakness of the testimony in supporting the issue of intent, petitioner concedes that said testimony supports the same, but notes that it was unnecessary in light of the other evidence.

As stated in *Brettholz*, the hereinbefore noted factors must all be balanced against "the degree to which the jury will probably be roused by the evidence to over-mastering hostility". *Brettholz, supra*, page 484.

Petitioner respectfully contends that the Second Circuit's decision in the case at bar completely ignored its own circuits law regarding the introduction of evidence of uncharged crimes, and therefore should be reversed.

CONCLUSION

For the foregoing reason, this petition for Writ of Certiorari should be granted.

Respectfully submitted,

SCHULMAN & LAIFER
Attorneys for Petitioner
166 Montague Street
Brooklyn, N.Y. 11201
(212) 855-8855

BENJAMIN A. DEMOS, OF
COUNSEL FOR PETITIONER
JAMES KENNEDY

APPENDIX

ORDER OF SECOND CIRCUIT**UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT**

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of September one thousand nine hundred and seventy-nine.

Present: HON. J. EDWARD LUMBARD
HON. WALTER R. MANSFIELD
HON. MURRAY I. GURFEIN
Circuit Judges,

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LAWRENCE WINTERS, a/k/a "Buddy Winters", JAMES
KENNEDY,
Defendants-Appellants.

79-1197, 79-1217

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said

District Court be and they hereby are affirmed in accordance with the Court's oral opinion in open court.

A. DANIEL FUSARO,
Clerk
s/ Arthur Heller
BY: Arthur Heller
Deputy Clerk